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No. 95-1255

In The

Supreme Court of the United States

October Term, 1995

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Petitioners,

vs.

WEST ONE BANK (IDAHO) fka THE IDAHO FIRST NATIONAL BANK, a national banking association, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause and this Court's holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 were violated by the Ninth Circuit's decision to deny Petitioners' motion to vacate all of the rulings of the District Judge entered prior to Petitioners' motion for disqualification, all of which were reviewed by the Ninth Circuit on a *de novo* basis, when Petitioners delayed filing that motion for more than eight months after ascertaining all of the grounds supporting the motion for disqualification and after the claims had been dismissed, because the District Judge should have recused himself based upon the appearance of impropriety under 28 U.S.C. § 455(a)?

2. Whether the District Court was required by 28 U.S.C. § 1447(c) to remand a case to state court when the notice of removal had been filed within thirty days of the filing of the case by the lawyers representing both of the two served defendants where only one of those defendants was expressly mentioned in the notice of removal but where the defendant named in the notice of removal was a wholly owned subsidiary of the other served defendant and both defendants consented to the removal and the court permitted the filing of an amendment to the notice of removal in which all of the defendants joined?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the Amended Memorandum of which is here for review, were:

1. Petitioners John J. Shelstad, Charles E. Minshew, and Keith A. Watson, Appellants in the Court of Appeals; and

2. Respondents West One Bank (Idaho) fka the Idaho First National Bank; West One Bancorp fka Moore Financial Group, Inc.; U.S. Bancorp, as successor by merger to West One Bancorp as of December 26, 1995; James Stewart; Thomas F. Ripke; Harry Bettis; V. Dale Blickenstaff; J. Gordon Brookover; William S. Campbell; Thomas C. Frye; Janet S. Hay; Kenlon P. Johnson; James S. Kinney; Jack B. Little; Daniel R. Nelson; Allen T. Noble; Philip B. Soulen; Douglas H. Rae; Norman J. Schoonover; Richard A. Symms; William J. Deasy; Fred C. Humphreys; Robert J. Lane; and Edward A. Conforti, Appellees in the Court of Appeals.

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent West One Bank, Idaho states that its corporate parent is Respondent West One Bancorp, an Idaho corporation which merged with U.S. Bancorp on December 26, 1995, its subsidiaries are wholly owned, and that it has no affiliates that have issued shares to the public.

Respondent West One Bancorp is the corporate parent to Respondent West One Bank, Idaho and issues shares of stock to the general public.

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APPENDIX

Appendix A — Order Denying Petition For Rehearing Of The United States Court Of Appeals For The Ninth Circuit Filed October 19, 1995 ..... 1a

The Respondents, West One Bank (Idaho) fka The Idaho First National Bank, a national banking association, *et al.*, respectfully request that this Court deny the Petition For A Writ Of Certiorari, seeking review of the Ninth Circuit's opinion in this case. The Ninth Circuit's Amended Memorandum filed on September 27, 1995 was ordered not appropriate for publication and may not be cited to or by the courts of the Circuit except as provided by Ninth Circuit Rule 36-3.

OPINIONS BELOW

The Panel's Amended Memorandum and Memorandum were "Not for Publication" and appear as Appendixes A and B to the Petition (P. App. 1 and 11). The Order denying the Petition for Rehearing and the rehearing *en banc* was "Not for Publication" and appears in Appendix A to this Brief (App. 1a-2a). The Order denying the Renewed Petition for Rehearing and for Rehearing *en banc* was "Not for Publication" and appears in the Petition as Appendix C (P. App. 20). The decisions of the District Court and of the magistrate are not reported and appear in the Petition as Appendixes D, E, and F (P. App. 21, 27 and 41). Attached as Appendix L to the Petition is the transcript of the in-chambers conference with the District Court on February 1, 1993 (P. App. 77).

STATEMENT OF JURISDICTION

The petition for writ of certiorari is not timely. Title 28 U.S.C. § 2101 requires a petition for certiorari in a civil case to be filed within 90 days of the entry of judgment below. *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990). *See also* Supreme Court Rules 13.1 and 13.4. The 90 day limit is mandatory and jurisdictional. *Id.*

The Ninth Circuit entered its original Memorandum on June

28, 1995. On July 11, 1995, Petitioners filed a Petition for Rehearing with Suggestion for Rehearing *en banc*. On September 27, 1995, the Ninth Circuit panel filed an Amended Memorandum. On October 10, 1995, prior to any ruling on their July 11, 1995, petition for rehearing, Petitioners filed a Renewed Petition for Rehearing with Suggestion for Rehearing *en banc*. On October 19, 1995, the Ninth Circuit entered its Order denying Petitioners' July 11, 1995 Petition for Rehearing and Suggestion for Rehearing *en banc* (App. 1a). On November 7, 1995, the Court of Appeals entered its Order denying Petitioners' Renewed Petition for Rehearing filed on October 10, 1995.

A petition for rehearing tolls the running of the 90 day period for seeking certiorari. *Missouri v. Jenkins*, 495 U.S. at 46. The tolling practice rests upon the fact that petitions for rehearing are authorized by Rule 40(a) of the Federal Rules of Appellate Procedure, and the circuit courts are required to entertain such a petition. 495 U.S. at 46 n.14. However, neither the applicable statute nor the Federal Rules of Appellate Procedure authorize a second or successive petition for rehearing. *National Latex Prod. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir. 1960). Accordingly, the time for filing a petition for a writ of certiorari begins to run from the date of denial of the petition for rehearing, and further suspension cannot be obtained by filing a second petition for rehearing. *Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 499 (1927); *Morse v. United States*, 270 U.S. 151, 153 (1926).

In this case, Petitioners' original petition for rehearing was denied on October 19, 1995 (App. 1a). Although they filed a second petition for rehearing, the Petitioners were not granted leave to file that petition and that petition was not granted. Therefore, the 90 day period within which to seek certiorari began to run on October 19, 1995. The petition for writ of certiorari was filed on February 5, 1996, more than 90 days after October 19, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

> No person shall . . . be deprived of life, liberty or property without due process of law.

28 U.S.C. § 455(a)

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(5)(i)

> He shall also disqualify himself in the following circumstances:
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (i) is a party to the proceedings, or an officer, director, or trustee of a party.

28 U.S.C. § 455(c)

> A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. § 455(e)

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1446

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceedings shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court

and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1447(c)

A motion to remand a case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Fed. R. Civ. P. 60(b)(6)

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(6) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a

> reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . .

STATEMENT OF THE CASE

A. Allegations in Complaint

Petitioners John J. Shelstad, Charles E. Minshew and Keith A. Watson are former shareholders of a corporation named Crew Concepts, Inc. ("Crew Concepts"). The claims in this case involve two loans made to Crew Concepts by Respondent West One Bank, Idaho ("Bank"). As former officers and owners of Crew Concepts, the Petitioners executed personal guarantees of the loans to Crew Concepts.

The Petitioners alleged that the Bank withdrew a financing commitment to Crew Concepts. When Crew Concepts was unable to raise capital the Petitioners sold their stock in that corporation. The loans were fully repaid to the Bank and no amount was ever collected against the personal guarantees. Crew Concepts was never a party in this case.

The complaint filed by the Petitioners sought compensatory, treble and punitive damages based on claims of (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) bad faith tort, (4) misrepresentation, fraud and deceit, (5) duress, and (6) violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1341, 1343, 1961, *et seq.*

B. Course of Proceedings

The Petitioners filed their complaint in Idaho state court on

August 17, 1989. On September 15, 1989, the Bank filed a Petition for Removal pursuant to 28 U.S.C. § 1441. Petitioners filed a motion to remand the case on September 16, 1989. On February 26, 1991, the United States Magistrate Judge, Mikel H. Williams, entered an Order denying Petitioners' motion for remand and granting Respondents' motion for leave to file an amended notice of removal. P. App. K, pp. 72-76. On July 26, 1991, United States District Judge Edward J. Lodge entered an Order adopting the decision of Magistrate Judge Williams, denying the motion for remand and granting the Respondents leave to file an amended notice of removal. P. App. J., pp. 70-71.[1]

On December 13, 1991 Magistrate Judge Williams filed a Report and Recommendation, granting Respondents' motion requesting dismissal of certain portions of Petitioners' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. P. App. I, pp. 58-69. On September 2, 1992 the District Court entered an Order adopting the Magistrate's Report and Recommendation. P. App. F., pp. 41-50.

By no later than November of 1992 Petitioners became aware that Judge Lodge's brother and nephew were employed by the Bank. They were also aware that Judge Lodge's sister-in-law had previously been an employee of the Bank. Supp. R. 52-57.

On February 1, 1993, a conference was held in chambers with Judge Lodge. Petitioners notified Judge Lodge that his brother and nephew were employees of the Bank. Judge Lodge acknowledged that his brother was an agricultural representative for the Bank and that his nephew was a loan officer. Further, Judge Lodge indicated that his sister-in-law, Sandra Lodge,

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1. A Magistrate Judge has jurisdiction to decide a motion to remand and a motion to amend. 28 U.S.C. § 636(b)(1)(A). Therefore, it was not actually necessary for District Judge Lodge to review Judge Williams' Order.

whom he had just recently met, may have worked for the Bank, but that he did not know the nature of her position or whether she was still employed by the Bank. P. App. L, pp. 77-92.

Contrary to the suggestion in their brief, Petitioners did not request Judge Lodge to recuse himself at that conference. The purpose of the meeting in chambers that day according to Petitioners' attorney was to obtain a ruling allowing discovery on the recusal issue by taking the depositions of Judge Lodge's relatives. P. App. L, pp. 77-92. Petitioners' attorney stated at the conference in relevant part:

> My concern is that to this point we have not had the factual development that would bear upon a question under either section 455(a) or section 455(b).

P. App. L, p. 79. Petitioners' attorney stated that they were requesting depositions of Judge Lodge's relatives to "determine whether or not there would be any basis for concerns under section 455" (P. App. L, p. 80) and that he needed "the opportunity to gather facts that I can make my case or not make my case." P. App. L, p. 88.

In their brief, Petitioners have taken Judge Lodge's comments out of context when they state that Judge Lodge "ruled from the bench" that he would not disqualify himself at the February 1, 1993 conference. Although Judge Lodge expressed doubt that there was a sufficient basis for recusal, Judge Lodge allowed Petitioners to conduct the requested discovery.

Contrary to the statement in their brief, Petitioners did not conduct discovery concerning the employment of Judge Lodge's relatives "over several months." Petitioners took all of the depositions of Judge Lodge's brother, sister-in-law, and nephew

on March 12, 1993. Petitioners also misstate the record when they contend in their brief that Judge Lodge's sister-in-law was a Vice-President of West One Bancorp as of December of 1992. She had retired from West One Bancorp by November 1, 1991 after marrying Judge Lodge's brother on March 21, 1991. Furthermore, although she briefly held a title of Vice-President prior to her retirement, she had no policy making role and was not an "officer" of West One Bancorp. Judge Lodge's brother, Norman Lodge, retired from the Bank on March 5, 1993. R. 342-350.

Petitioners indicated at the February 1, 1993 conference that they would complete discovery within sixty days and file a motion to disqualify if the discovery disclosed any grounds for disqualification. P. App. L, pp. 79-80. However, the Petitioners did not move to disqualify Judge Lodge within the sixty day period. As expressly recognized by the Ninth Circuit, Petitioners "contend that Judge Lodge denied oral requests for recusal on two prior occasions, but the record shows that Petitioners' actions never amounted to such a request. Rather, discovery on the issue was discussed in proceedings before the Court on February 1, 1993, and Judge Lodge refrained from recusing himself." P. App. A, p. 5, n.2.

Instead of moving to disqualify Judge Lodge, Petitioners filed their opposition to Respondents' motions to dismiss filed on December 10, 1992 and participated in the hearing held on May 18, 1993 before Magistrate Judge Williams. Magistrate Williams entered his Report and Recommendation on June 18, 1993, recommending dismissal of Petitioners' remaining claims. P. App. E, pp. 27-40. Petitioners filed an objection to the Report and Recommendation on June 28, 1993 which they knew would be reviewed by Judge Lodge.

On November 2, 1993 Judge Lodge entered an Order approving the Report and Recommendation to dismiss

Petitioners' action. P. App. D, pp. 21-26. Finally upon learning of Judge Lodge's adverse decision dismissing their remaining claims and after delaying for almost eight months after conducting formal discovery on the issue, Petitioners filed their motion to disqualify Judge Lodge and to vacate his rulings pursuant to Federal Rule of Civil Procedure 60(b)(6) on November 5, 1993. R. 188.

On February 24, 1994, Judge Lodge denied the motion for disqualification, stating three basic reasons for his ruling. First, Judge Lodge concluded the motion was untimely because it was filed years after the case began and months after discovery of his relatives' employment status. Second, Judge Lodge recognized that there was no evidence that his relatives were directly or indirectly involved with the subject matter of the litigation. Relying upon the Ninth Circuit's decision in *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991) (section 455(a) recusal not required when judge's son was employed by party in nonmanagement position), Judge Lodge concluded that his relatives' employment status alone would not lead a reasonable person to conclude that his impartiality might reasonably be questioned. R. 342-350.

Finally, Judge Lodge stated that it appeared to the Court that Petitioners' motion for disqualification was "simply a tactic to frustrate the judicial system in response to rulings in favor of the defendants" and that it was only after an unfavorable ruling dismissing the case that the Petitioners filed their motion. R. 346-347. Judge Lodge also awarded the Respondents $150,000 in attorneys' fees. R. 347-350.

The Petitioners appealed, contending that the removal was improper, that their claims should not have been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), that Judge Lodge should have granted the motion for disqualification and that the attorneys' fees award was not justified.

The Ninth Circuit conducted a *de novo* review of both the removal issue and the dismissal of claims, and affirmed the District Court's decision. With regard to the disqualification issue, the Ninth Circuit concluded that because the Petitioners failed to move for disqualification for nearly eight months after they ascertained the grounds set forth in their motion and after the Court dismissed their claims, that the District Court did not abuse its discretion in finding the motion untimely and denying relief from the Court's prior Orders dismissing the claims. The Ninth Circuit Court noted that it was not until the time that the motion was filed that Petitioners fully explained why Judge Lodge should have recused himself. P. App. A, pp. 1-10.

The Ninth Circuit did conclude, however, that under 28 U.S.C. § 455(a) Judge Lodge abused his discretion by failing to recuse himself when the motion was finally filed and he had been fully apprised of the grounds for recusal. The Ninth Circuit concluded that a reasonable person would question his impartiality because his brother, sister-in-law and nephew were employees of the Bank at one time or another while this case was before him. As a result, the Ninth Circuit vacated Judge Lodge's subsequent Order awarding attorneys' fees to Respondents and remanded the question to a different judge. The Ninth Circuit stated that it was making this ruling to prevent "undermining the public confidence in the judicial process." *Citing Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). P. App. A, pp. 1-10.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION TO VACATE ONLY THOSE ORDERS OF THE DISTRICT COURT THAT WERE ENTERED AFTER THE PETITIONERS FILED A MOTION TO DISQUALIFY DISTRICT JUDGE LODGE IS NOT CONTRARY TO THE DECISIONS OF THIS COURT AND DOES NOT VIOLATE DUE PROCESS.

A. The Ninth Circuit's Decision To Deny Petitioners' Request For The Remedy Of Vacatur Of Judge Lodge's Orders Entered Prior To Their Motion To Disqualify Was Consistent With This Court's Decision In *Liljeberg*.

Petitioners argue that this Court should grant a writ of certiorari to "close a gap" created by *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). However, a careful review of *Liljeberg* and their argument reveals that the Petitioners are actually requesting this Court to reject that decision and adopt a rule of automatic, retroactive vacatur whenever a judge should have recused himself under section 455(a), but failed to do so, without regard to the timeliness of the complaining party's motion to disqualify and that party's knowledge of the grounds for disqualification. The adoption of such a rule would inevitably lead to "legal gamesmanship," "sandbagging" and "judge shopping" regarding the timing of filing motions to disqualify federal judges as evidenced by this case.

The Ninth Circuit's decision in this case denying vacatur of Judge Lodge's Orders until after Petitioners filed their belated motion for disqualification was consistent with the rationale and pronouncements in *Liljeberg*. Furthermore, Circuit Court

decisions subsequent to *Liljeberg* are consistent with the decision of the Ninth Circuit in this case. There is no conflict that exists between the Circuit Courts on the issues presented in this case. Thus, there is no reason for granting certiorari. Supreme Court Rule 10.

In *Liljeberg*, this Court undertook the first significant interpretation of the 1974 amendments to 28 U.S.C. § 455. In particular, this Court addressed whether a judge can be disqualified under Section 455(a) even though not conscious of the circumstances that might cause his impartiality to be questioned, and second, when vacatur pursuant to Fed. R. Civ. P. 60(b) is an appropriate remedy.

The *Liljeberg* Court recognized that although Section 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty and that Congress had wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation. The Court also expressly stated that in considering the appropriate remedy for a violation of Section 455(a), the Court of Appeals is in "a better position to evaluate the significance of the violation" and that its "judgment as to the proper remedy should thus be afforded our due consideration." *Id.* at 862.

The Petitioners in this case filed their motion to disqualify Judge Lodge almost eight months after they had ascertained, by conducting requested discovery, the potential grounds for disqualification set forth in their motion and after the dismissal of all of their claims. Based upon this delay, the Ninth Circuit found it appropriate to deny Petitioners' Rule 60(b)(6) motion to vacate Judge Lodge's decisions entered prior to the filing of Petitioners' motion for disqualification.

In *Liljeberg*, the Court affirmed the Court of Appeals' determination to allow a new trial. In reaching its conclusion, the *Liljeberg* majority noted that Section 455 does not, by itself, authorize the reopening of closed litigation. The Court recognized that Rule 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. The Court noted that Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). *Id* at 863.

The Court expressly confirmed the continuing applicability of previous Supreme Court decisions cautioning that the remedy of vacating judgments under Rule 60(b)(6) should only be applied in "extraordinary circumstances," and that Rule 60(b)(6) relief is neither categorically available nor categorically unavailable for all Section 455(a) violations. *Id.* at 863. The *Liljeberg* majority stated that in considering the availability of vacatur as an appropriate remedy that three factors should be considered: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864. The Court then examined the case before it in light of these factors.

As noted above, the Ninth Circuit's decision to affirm a portion of the District Court's decision denying vacatur of Judge Lodge's Orders prior to Petitioners' motion for disqualification and vacatur pursuant to Rule 60(b)(6) is based upon the Petitioners' delay in filing that motion. In *Liljeberg*, the majority found it significant to expressly address the fact that the motion for disqualification and vacatur of the judgment in that case had been filed ten months after the Court's final decision, but promptly after the basis for recusal was discovered. The

Liljeberg court expressly stated that a delay of ten months after the affirmance by the Court of Appeals "would normally foreclose relief based on a violation of Section 455(a)." *Id.* at 869. However, the *Liljeberg* majority concluded that the delay in filing the motion in that case "did not involve neglect or lack of due diligence" but was caused by the judge's failure to inform the parties of the facts which were the basis of the grounds for disqualification and that those facts would not have been made apparent through the examination of judicial disclosure reports. *Id.* at 864, n.11. Under those circumstances, the Court concluded that the remedy of vacatur was not prohibited. The Petitioners cannot reasonably contend that their delay was similarly justified.

The Petitioners filed their motion for disqualification after Judge Lodge entered his final order dismissing the Petitioners' remaining claims. As recognized by the Ninth Circuit, Petitioners delayed filing their motion for disqualification for nearly eight months after they had ascertained all of the grounds set forth in their motion. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding the motion untimely and denying relief from its prior orders dismissing the claims. *See Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).[2]

B. Analysis Of *Liljeberg's* Three Factors Demonstrates That Denial Of Vacatur Was Appropriate.

An analysis of *Liljeberg's* three factors leads to the

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2. Consistent with *Liljeberg*, the Ninth Circuit expressly recognized that although 28 U.S.C. §455 is self-enforcing on the part of the judge, a party having information that raises a possible ground for disqualification may not wait until after an infavorable judgment to bring the information to the judge's attention. *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). The Ninth Circuit also correctly concluded that the motion must be made with reasonable promptness after the ground for such a motion is ascertained. *Id.*

conclusion that vacatur of all of Judge Lodge's rulings in this case was not required or appropriate.[3] Indeed, under the expressed standard in *Liljeberg*, the Ninth Circuit could have concluded that the Petitioners' motion to disqualify was untimely and affirmed Judge Lodge's ruling awarding attorneys' fees subsequent to Petitioners' motion to disqualify. Regarding the first factor, there is no indication of any risk of injustice to the parties in the case if the Orders entered prior to the motion to disqualify are not vacated. Judge Lodge adopted the order addressing the remand motion and two different Reports and Recommendations of Magistrate Judge Williams recommending the dismissal of claims under Rule 12(b)(6). More importantly, the Ninth Circuit actually conducted a *de novo* review of both the dismissal of the Petitioners' Complaint and the remand issue on appeal. Finally, discovery revealed that Judge Lodge's relatives had no involvement with the case and Petitioners have never even suggested that any actual bias or prejudice existed in the case.

Regarding the second factor identified in *Liljeberg*, there is nothing in the record demonstrating that the denial of the requested relief will produce injustice in other cases and the Petitioners present no argument that such will occur.

The third factor is the risk of undermining public confidence in the judicial system. Again, there is no indication that such a

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3. In *Liljeberg*, the majority stated:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that indetermining whether a judgment should be vacated for a violation of § 455(a),it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, andthe risk of undermining the public's confidence in the judicial process.

risk exists in this case. The fact that Judge Lodge's rulings were the same as Judge Williams and were reviewed *de novo* by the Ninth Circuit should eliminate any potential for undermining the public confidence. To the contrary, the First Circuit Court has recently recognized that granting vacatur in a case such as this could actually have the effect of undermining the public's confidence in the judicial system by sanctioning "judge shopping" and rewarding "sandbagging" and "litigation gamesmanship" by attorneys. *In re Cargill*, 66 F.3d 1256 (1st Cir. 1995).

In *Cargill*, the First Circuit was highly critical of the Cargill's delay in filing a motion for recusal approximately one month after becoming aware of the potential grounds for recusal when that motion was filed shortly after an adverse decision. The court criticized Cargill for holding its Section 455(a) argument in reserve and deferring any recusal initiative awaiting the motion to dismiss. 66 F.3d at 1263. The court stated that Cargill's delay has the "appearance of judge-shopping." *Id.* at 1264. In denying Cargill's writ of mandamus the First Circuit recognized by allowing such a delay in filing a motion for recusal that there is a "risk of eroding public confidence in the courts by seeming to reward a litigant for its gamesmanship." *Id.* at 1264. *See, e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a Section 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning of the Court's ruling on the merits.") *cert. denied*, 481 U.S. 1016 (1987).

Petitioners have never even suggested that they have a justifiable reason for the eight month delay in filing their motion for disqualification of Judge Lodge in this case. They simply argue for the adoption of an inflexible rule of automatic vacatur whenever a judge knows or should have known of a basis for recusal. The adoption of such a rule has no support in § 455 or the

case law of any federal court. It would undoubtedly result in a waste of judicial resources as it would become a tactical advantage, without risk to the litigants and their attorneys, to delay filing a motion to disqualify until after the judge announces his decision.

The Ninth Circuit's decision to deny vacatur based on Petitioners' untimely motion also has statutory support from Congress' decision to expressly recognize that a § 455(a) disqualification can be waived by the parties. 28 U.S.C. § 455(e). Section 455(e) provides that a Section 455(a) ground for disqualification may be waived if preceded by full disclosure on the record of the basis for disqualification. In this case, the Petitioners obtained full disclosure by conducting the discovery completed in March of 1993. However, they delayed filing a motion to disqualify for almost eight months after completing that discovery, although they suggested to the district judge that a motion would be filed in 60 days if a basis for disqualification was discovered. Several courts addressing similar situations have held that such a delay may constitute an implicit waiver under § 455(e).

In *United States v. Nobel*, 696 F.2d 231 (3rd Cir. 1982), a criminal defendant's lawyer did not object to the district judge's failure to disqualify himself under Section 455(a) after full disclosure of the relevant facts which later served as the grounds on which new counsel based a disqualification motion. The Third Circuit held that under the circumstances the failure to object and the election to proceed in the case constituted a waiver of disqualification covered by Section 455(e). 696 F.2d at 236-237. *See, e.g., United States v. Brinkworth*, 68 F.3d 633, 638 (2nd Cir. 1995).

C. The Self-Enforcing Nature Of § 455(a) Does Not Mandate Automatic Vacatur Of Judge Lodge's Prior Decisions.

The Petitioners also argue that the Ninth Circuit's decision

ignores Judge Lodge's independent duty to recuse himself and that he had an "absolute duty" to investigate and be aware of the employment status of his close relations. Petitioners' argument is without merit. Although the Ninth Circuit expressly recognized that Section 455 is "self-enforcing," the issue was whether a remedy of vacatur was required under Rule 60(b)(6) when the Petitioners delayed pursuing disqualification for eight months, until after all of the claims in the case had been dismissed. Consistent with this Court's decision in *Liljeberg* and other courts addressing the effect of delay in filing a motion to disqualify, the Ninth Circuit correctly concluded that vacatur was not required. Furthermore, a judge is not statutorily required to conduct the breadth of investigation of his relatives as suggested by Petitioners. Section 455(c) only requires a judge to inform himself about the "personal and fiduciary financial interests" of his spouse and minor children residing in his household, which was not at issue in this case.

D. Section 455(b)(5)(i) Has No Relevance To The Issues Presented In This Case.

Petitioners argue that as a result of the February 1, 1993 in chambers conference, Judge Lodge had an obligation to determine whether any of his close relatives were officers of either corporation under 28 U.S.C. § 455(b)(5)(i). The Petitioners then incorrectly state that if Judge Lodge had conducted such an investigation, he would have determined that his sister-in-law was an "officer" of West One Bancorp. That contention misstates the record in this case. Although Judge Lodge's sister-in-law did hold the title of "Vice-President," she had left her employment with the Respondents more than one year prior to the February 1, 1993 conference, having retired November 1, 1991. Furthermore, the record in this case established that Sandra Lodge was not an "officer" as that term is used in Section 455(b)(5)(i) because she had no policy making

role. *E.g., Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556 (Fed. Cir. 1989).[4]

E. Denial Of Vacatur Is Not A Violation Of Due Process.

Petitioners also suggest the Ninth Circuit's decision to deny vacatur of all of Judge Lodge's Orders constituted a violation of due process, citing the Court's decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). That decision does not support such a determination and, to the contrary, supports the opposite conclusion. In that case, a justice of the Alabama Supreme Court had declined to recuse himself from participation in a case deciding whether a claim of bad faith tort was a valid cause of action in the State of Alabama. The justice whose disqualification was sought had cast the deciding vote (5-4 vote) in that case. At that time, the justice had a suit pending in which he was a party in another Alabama Court raising the same issue. As a result of the Alabama Supreme Court's decision, the judge obtained a substantial economic benefit from the other litigation in which he was a party. In *Aetna* the majority recognized that the judge was effectively acting as "a judge in his own case," and

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4. The record below established that, at relevant times, West One Bancorp employed 4,692 employees, 407 of which were Vice-Presidents. Supp. R. 60. The Bank and West One Bancorp employed 56 senior vice-presidents and 14 executive vice-presidents. Supp. R. 60; R. 200. However, only the senior vice-presidents and executive vice-presidents hold high enough positions to have the authority to make policy decisions. Supp. R. 60; R. 200. Sandra Lodge was employed as an assistant manager of the contract funding department of West One Bancorp from 1987 until she left in November of 1991. The department purchased real estate contracts. R. 203. In 1989, two years prior to becoming Judge Lodge's sister-in-law, Sandra was given a change in title only, to Vice-President of Operations for the Contract Funding Department. This change in title did not change her duties or responsibilities whatsoever. R. 207.

held that refusing to recuse himself violated due process.[5] The majority decision in *Aetna* was based on the judge's "direct stake in the outcome of the case." However, the *Aetna* court expressly recognized that a successful due process challenge may be limited, even when there are allegations of "bias or prejudice," stating: "Certainly only in the most extreme cases would disqualification on this basis be constitutionally required." 475 U.S. at 821.

Respondents still believe that contrary to the decision of the Ninth Circuit, the employment status of Judge Lodge's relatives did not require recusal under Section 455(a) in this case. In any event, it cannot reasonably be contended that this case presents the type of "extreme case" necessitating the protection of the due process clause.

F. The Ninth Circuit's Decision Is Not In Conflict With Any Other Circuit Or District Court Decision.

Finally, it should be recognized the Petitioners do not contend that the Ninth Circuit's decision is inconsistent with any other circuit court or lower court decision. To the contrary, decisions found by Respondents are all consistent with the Ninth Circuit's decision to deny vacatur of Judge Lodge's Orders. *E.g.*, *United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995) ("a prompt filing avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings in pending matters"). *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) (vacatur of prior rulings not necessary for Section 455 disqualification); *In re: School Asbestos Litigation*, 977 F.2d 764 (3rd Cir. 1992) (vacatur of rulings by judges who failed to

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5. The *Aetna* court concluded that its decision was supported by its earlier decision in *Tumey v. Ohio*, 273U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57(1972). Those cases also do not support the Petitioners contention that a due process violation occurred in this case.

disqualify themselves for appearance of partiality ought to be as limited as possible); *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 334 (2d Cir. 1987) (noting that a "movant may not hold back and wait, hedging its bets against the eventual outcome"); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("counsel, knowing the facts claimed to support a Section 455(a) recusal for appearance of impartiality may not lie in wait, raising the recusal issue only after learning of the court's ruling on the merits."), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987); *Rohrback v. AT&T Nassau Metals Corp.*, 1996 WL 77637 (M.D. Pa. 1996) (inflexible rule requiring vacatur is inappropriate).

II.

THE NINTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT WAS NOT REQUIRED TO REMAND THIS CASE TO STATE COURT.

The Petitioners filed this case in state court on August 17, 1989. On September 15, 1989 the attorneys representing both the Bank and its parent, West One Bancorp, filed and served a Petition for Removal. Contrary to the suggestion in Petitioners' Brief, West One Bancorp and the Bank were the only Respondents that had been served prior to the filing of the Petition for Removal. The individual Defendants had still not been served. R. 29-31, 40-51, 55.[6] West One Bancorp was not expressly named in that Petition. However, the in-house lawyer that accepted service of the Complaint for both of the Corporate Respondents did verify the removal petition.

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6. It is well settled that defendants who have not been served at the time the Petition for Removal is filed need not join in the Petition. *E.g., Salverson Salverson v. Western States Bankcard Assn.*, 731 F.2d 1423, 1429 (9th Cir.1984)

Magistrate Judge Williams and District Judge Lodge both concluded that the Petition for Removal was not fatally flawed and granted Respondents' motion for leave to file and amend the petition to correct the procedural deficiency pursuant to 28 U.S.C. § 1653. The Ninth Circuit conducted a *de novo* review of this issue and affirmed the decision that remand to state court was not required.

It is undisputed that the District Court had subject matter jurisdiction over this case. The Ninth Circuit did not err in affirming the denial of Petitioners' motion for remand for two basic reasons. First, West One Bancorp had consented to removal and that consent had been sufficiently manifested. Second, both the Magistrate Judge and the District Judge appropriately granted leave to file an amended notice of removal to allow all Defendants to join in the Petition for Removal.

The removal statute does not require that every defendant actually sign a removal petition. 28 U.S.C. § 1446. Nonpetitioning defendants may simply consent to the removal of the action, thereby satisfying the substantive requirement that the defendants be unanimous in their choice of a federal forum. *Hernandez v. Six Flags Magic Mountain, Inc.*, 688 F. Supp. 560, 562 (C.D. Cal. 1988).

In this case, West One Bancorp's consent was manifested by its attorneys filing the Petition for Removal. The Bank is a wholly-owned subsidiary of West One Bancorp. Letters from Petitioners' counsel prior to the filing of the Petition for Removal, submitted to Magistrate Judge Williams, demonstrated that Petitioners were aware that the Bank's in-house counsel, who verified the initial Petition for Removal, also represented West One Bancorp. The Bank and West One Bancorp shared corporate offices where Petitioners served both of those entities by delivering copies of the complaint to a single

individual. R. 92-93. Thus, the filing of the removal petition in and of itself sufficiently manifested West One Bancorp's consent.

Even if West One Bancorp did not sufficiently manifest its consent to the removal, it was not inappropriate to grant Defendants leave to amend their removal petition. The time limitation for removal is not jurisdictional. *Hernandez v. Six Flags, supra*, at 562. Where the District Court has jurisdiction, it has the power to consider an untimely removal petition and remand is not mandatory. *Id. Glover v. W.R. Grace & Co.*, 773 F. Supp. 964 (E.D. Tex. 1991) (where diversity jurisdiction existed, court would not remand action based on defendant's consent to removal being four days late).

The right to amend pleadings under Section 1653 includes amending removal petitions. *Barrow Development Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969). An amendment under Section 1653 may be allowed at any time, especially when it appears that the District Court clearly had subject matter jurisdiction and defendants have been allowed to supplement their pleadings to join in a removal petition after the expiration of the thirty day removal period. *E.g., In re First Nat'l Bank*, 70 F.3d 1184, 1189 (11th Cir. 1995); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369 (7th Cir. 1993); *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978). The Eleventh Circuit has gone beyond simply allowing the amendment of a removal petition and actually deemed the petition to have been amended to include a defendant that did not join in the removal petition. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987). *See also, Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988)(matter remanded to District Court with instructions "to permit amendment of the removal petition to name all proper defendants" in order to prevent a pleading omission that would "otherwise render the removal petition procedurally defective.").

In this case, there is no dispute that the District Court had subject matter jurisdiction. Furthermore, the Petitioners have not asserted that they were prejudiced by the amended notice of removal. The thirty day removal rule is designed to deprive defendants of a tactical advantage of waiting to see how a state court case is proceeding before removing and to prevent delay and the waste of resources before beginning a federal court case. *E.g., Ford v. New United Motors Mfg.*, 857 F. Supp. 707, 709-710 (N.D. Cal. 1994); *Hernandez v. Six Flags, supra*, 688 F. Supp. at 563. No allegations of prejudice have been made in this case. In fact, the amendment of the petition precluded the "great and needless waste of judicial time and effort, real prejudice to the parties, and severe injustice" which would have resulted from remand. *LeNeave v. North Am. Life Assurance Co.*, 632 F. Supp. 1453, 1455 (D. Minn. 1986). This case has been pending since 1989. To remand this action now would unduly delay this proceeding, cause the parties to incur significant attorney fees to relitigate issues that have already been determined, and will result in the waste of significant judicial resources.

In conducting its *de novo* review of the District Court's denial of Petitioners' motion to remand, the Ninth Circuit correctly recognized that 28 U.S.C. § 1447(c) only requires the District Court to remand the case to the state court if it lacks subject matter jurisdiction. Procedural defects in removal are not jurisdictional and such defects may be waived. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). Because the District Court had jurisdiction under 28 U.S.C. § 1331, the Ninth Circuit did not err in allowing a "waiver" of any technical requirement that both served defendants actually sign the removal documents where the other served defendant filed a petition for removal within thirty days of the filing of the Complaint and the defendant filing the removal petition was represented by the same attorney and was a wholly owned subsidiary of the other served defendant.

In their brief Petitioners suggest that the District Court's decision is in conflict with Circuit Court decisions *In re Continental Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *Page v. City of Southfield*, 45 F.3d 128 (6th Cir. 1995); and *In re Allstate*, 8 F.3d 219 (5th Cir. 1993). Such a suggestion is not correct. In those cases the Circuit Courts simply concluded that a District Court cannot remand a case on its own motion for a defect in removal procedure. That issue is not involved in this case. Furthermore, at least one of those cases directly supports the conclusion reached by the Ninth Circuit in this case. In *In re Allstate*, *supra*, the Fifth Circuit, in reaching its conclusion that the District Court could not *sua sponte* remand the case to state court, recognized that where subject matter exists, procedural shortcomings can be cured by resort to 28 U.S.C. § 1653.

As discussed above, it is well recognized that any procedural deficiency in a petition for removal may be cured by resort to 28 U.S.C. § 1653. Contrary to Petitioners' contention, the Ninth Circuit's decision does not render meaningless the thirty day time limit in Section 1446(b). The Ninth Circuit did not rule that the District Court was prohibited from remanding the case to state court. Rather, the Ninth Circuit simply concluded that the District Court did not err by rejecting Petitioners' motion for remand under the circumstances in this case. There is no conflict among the Circuit Courts.

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari should be denied.

Dated: March 18, 1996

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 19, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 94-35275

D.C. NO. CV-89-01248-EJL

JOHN L. SHELSTAD; CHARLES E. MINSHEW; KEITH A. WATSON,

Plaintiffs-Appellants,

v.

WEST ONE BANK, fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP, fka Moore Financial Group, Inc., et al.,

Defendants-Appellees.

Before: WRIGHT, SKOPIL and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for

rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**